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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 889

ESTATE OF R. A. SEWELL, JOSEPHINE M. SEWELL,
EXECUTRIX,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Estate of R. A. Sewell, Josephine M. Sewell, Executrix, respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above-entitled cause, and denying her petition for a rehearing, filed in said cause.

Judgment and Opinion Below

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on November 9, 1945 (Record 206-209), and its opinion on that date is reported in the Advanced

Sheets of the Federal Reporter, *Sewell's Estate* v. *Commissioner*, 151 F. (2d) 806 (No. 12, January 14, 1946). The judgment below affirms the decision of the Tax Court of the United States (R. 34-78, 84), which has not been reported.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on November 9, 1945 (R. 209). Petitioner filed her petition for rehearing on November 29, 1945 (R. 210). The Circuit Court of Appeals entered its order and judgment denying such petition for rehearing on December 28, 1945 (R. 218). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347).

Statement of the Case

This case involves alleged errors in income tax deficiencies for the years 1934, 1935, 1936, and 1937, imposed upon R. A. Sewell and his Estate (after his death in 1940) (R. 5-20). The basic issues controlling taxability of dividends, profits from sales and pledges, and interest on proceeds therefrom, against Sewell during the first three of those years, concern the completeness and validity, for Federal income tax purposes, of his alleged gift, on January 2, 1934, to his wife, Josephine M. Sewell (Petitioner as Executrix), of 1,000 shares of corporate stock in Sewell Manufacturing Company, a Georgia corporation, and both parties being residents of Georgia, and of 300 additional shares of that Company in July, 1936; all of which shares, without physical delivery of the certificates to her, were, under the practice of the Company to retain stockholders' certificates in its Stock Book, transferred to her on the books of the corporation, the old certificates being marked "Canceled," and the new ones issued in her name, with other facts as hereafter

indicated. The other basic issue concerns the existence of an alleged partnership during 1936 and 1937, or either year, between R. A. Sewell and Josephine M. Sewell, with their four minor children added as special partners from July 1, 1937, on which depends the taxability of profits of the business conducted under the name of Sewell Hat Manufacturing Company and Sewell Hats. The necessary facts on the legal questions involved are indicated therein, and for a clearer understanding of the case are stated with more detail in the supporting Brief.

Two other cases—*W. P. Sewell* v. *Commissioner of Internal Revenue* and *R. B. Sewell* v. *Commissioner*—were, for convenience in taking evidence, heard by the Tax Court with this case, and it was agreed that any evidence in one case could be considered in any other so far as pertinent therein; but there was never any consolidation of this case with the others (R. 103, 152, 34, 84, 206, 209, 218). All involved gifts of stock in the same Company, but the facts as to dominion and control, and sales and pledges of the stock by the present donee, were essentially different; and the present case alone involved questions of partnership.

The Tax Court ruled adversely to Petitioner as to each of the basic issues and the legal questions next stated; and the Circuit Court of Appeals affirmed its decision thereon. (R. 34-52, 55-71, 76-78—omitting references to other petitioners; 206-209, 218.)

The Questions Presented, and Specification of Errors

1. Where the formalities of local law, under statutes and appellate decisions of the State of the property transactions, are observed in the making of gifts of corporate stock, and in the formation of a partnership thereafter between the donor and donee, a husband and wife, and there is no fraud or sham designed to evade Federal income

taxes, and the gifts and the partnership each are manifested, orally and in writings, by actual overt acts of the parties which are sufficient under such local law to render each transaction complete and valid under that law—can the Tax Court of the United States, and a United States Circuit Court of Appeals on a petition by the taxpayer to review the decision of the Tax Court, properly fail to give effect to such local law, either as to gift or as to partnership, in a controversy between the husband (and his estate after his death) and the Commissioner of Internal Revenue as to Federal income taxes, alleged tax deficiencies on income and profits from the alleged gifts or their proceeds and on profits of the alleged partnership, under the Commissioner's contention that there was neither any complete or valid gift, nor any valid partnership, for Federal inome tax purposes, and therefore the husband and his estate are liable for all such income and profits? The Circuit Court of Appeals and the Tax Court of the United Stats each erred in failing to apply such controlling local law to each of such transactions, especially where the Tax Court found that there were no fraud and no "shams designed to evade tax."

2. Where, at the time of an alleged gift of shares of corporate stock, there is no express agreement or understanding between an alleged donor and donee (a husband and wife) that the husband shall retain dominion and control over the gift stock or income or proceeds therefrom, and the husband never asserts any dominion or control over the stock itself, and his only exercise, if any, of dominion or control over the subject-matter of the alleged gift is that, more than sixteen months after the alleged gift and subsequently, he uses proceeds therefrom to build and equip a manufacturing plant and operate the same, and where (after the husband's death), in a controversy

between the Commissioner and the wife (as executrix of the husband's estate) as to liability for Federal income taxes on income, profits, and interest from the subject-matter of the alleged gift or its proceeds, the wife claims that such uses by the husband of such monies were under a loan from her for uses other than by gift from her to him, and there is nothing to evidence any such gift by her to him of either the subject-matter of the gift or its proceeds, or as to any *consent* by her to such uses other than by loan to him of such monies—would the mere fact of such uses by him of the monies, sixteen months after the alleged gift and subsequently, be significant or pertinent to manifest and establish a lack of donative intent in the making of such alleged gift, and thus invalidate the gift? The decisions of the United States Circuit Court of Appeals and of the Tax Court were based primarily on the holding, as to this Petitioner, that such long subsequent uses sufficed to manifest an absence of essential donative intent in the making of the two alleged stock gifts, and therefore they were incomplete and invalid; and such holdings being based on an erroneous rule of law in testing the validity of a gift, each Court erred therein, and in failing to apply the correct rule that such uses long after the gifts were not pertinent or significant to show invalidity of the gifts.

3. Where gifts of corporate stock from a husband to a wife are made by transfer on the books of the Company, the original certificates being marked "Canceled," and new certificates being properly issued with her name therein, which, according to the practice of the Company and its stockholders (consisting both of brothers of the husband and of others), remain in the Stock Book in its vault in the custody of its secretary and treasurer (not a family stockholder) in its vault at its offices, accessible at any time to the wife, and where, under the law of the State, such

transfers, with the undisputed acts of the parties, would be sufficient to constitute complete and valid gifts—would the mere fact that the parties are husband and wife, and that, more than sixteen months after the alleged gift and subsequently, the husband uses proceeds from such stock in building and equipping a manufacturing plant and starting the operation of such business, nullify the alleged gifts for Federal income tax purposes under Sections 11, 12, and 22 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680, and identical provisions under those numbers in the Revenue Act of 1936, c. 690, 49 Stat. 1648 (subsequent Revenue Acts containing identical provisions)—the statutes in force at the time of the transactions in question—or nullify the alleged gifts by any applicable Federal legal rule, under the Revenue statutes, controlling such transactions? The Circuit Court of Appeals and the Tax Court each erred in misconstruing the proper rule of law in such a case, and in thus holding that the gifts were incomplete and invalid for lack of donative intent because of dominion and control of the donor (exercised only by long-subsequent uses of the proceeds, as stated, which did not constitute dominion and control over the gift within the meaning of the law of gifts or the Federal income tax statutes).

4. Where, under the laws of Georgia (the State of residence of the parties and of the transactions in question) effective at the time of the transactions, a gift is valid if there is an intention by the donor to give, acceptance by the donee, and delivery of the article given or some act accepted by the law in lieu thereof, and if the donation is of substantial benefit, acceptance is presumed unless the contrary is shown, and where under such local law an actual manual delivery is not essential to the validity of a gift, but a constructive or symbolic delivery, manifested by the donor's relinquishment of dominion and control and

by the donee's exercise thereof, suffices, and where there are neither fraud nor "shams designed to evade tax" in the transactions in question—does the owner of stock in a Georgia corporation sufficiently express and establish donative intent, essential for a valid gift, and complete and effect a valid gift to his wife of shares of such stock, where, before and at the time of such transfer, he informs her, the corporate officers, and other persons of his intention to give her such stock, and by his direction the certificates for such shares standing in his name on the Company's Stock Book are marked "Canceled," and new certificates for such shares, sealed and signed by the proper corporate officers, are issued in her name, which certificates are not manually delivered to her, but, according to the practice of the Company and other stockholders as to holdings and dealings in stock, remain in the Company's Stock Certificate Book undetached therefrom, in the custody of its secretary and treasurer in the vault of its office, open and accessible to stockholders and with access of the wife to such book and certificates at any time; and where she does not indorse such certificates at the time of their issuance to her or until about the time of her sale of part of such stock to other persons, the first between eleven and twelve months after the alleged gift, and other sales seventeen, twenty, twenty-one, thirty-four, and forty-six months after such alleged gift; and where the wife herself also executes valid, unquestioned pledge contracts to other persons, pledging more than one-fourth of such stock as security for loans to her, after the alleged gift, which instruments are signed by herself as pledgor and by the pledgees, attested, and recorded in the public records, and the wife also later exercises the option given her by the pledge contracts to surrender the stock to the pledgees instead of paying the loans; and where the husband makes to the Government income tax authorities sworn Gift Tax Re-

turns as donor, showing the gifts of stock to the wife, and the wife attaches to such returns her signed acknowledgments as to the making of such gifts, and the husband pays the gift taxes assessed thereon; and where both, by separate Individual Income Tax Returns after the alleged gifts, report to the Government tax authorities the dividends, interest, and profits from said sales and pledges of stock, only as accruing from shares of stock and monies belonging to the wife, and she pays the income taxes thereon; such transactions being during the years from 1934 to 1937 inclusive? The Circuit Court of Appeals and the Tax Court erred in holding that such transfers of stock and acts did not constitute complete and valid gifts as to each of such years; and in failing to give effect to the correct rule of law that such transfers on the corporate books and acts were sufficient.

5. Where an alleged gift of corporate stock, such as stated in the preceding questions, is made by a husband to his wife in a January (1934), and during that tax year dividends accrue with profits therefrom, which monies, according to the practice of the Company with all its stockholders to act for them practically as a bank by allowing accounts on its books with credit and debit entries, are so credited to the wife's separate account on its books, and such monies so remain in such account throughout the same calendar year (1934) without any withdrawal or use by her or the husband during that year and early in the next year (1935) the husband makes to the Government tax authorities a Gift Tax Return showing such stock as given to the wife, to which Return she attaches her own signed Donee's Information Return certifying the correctness of such gift, and the husband pays the Gift Taxes thereon as assessed by the tax authorities; and also, early in the year (1935) after that of such alleged gift and such accrual of monies

and credit thereof to the wife's account, she makes her Individual Income Tax Return to the Government tax authorities, returning and paying income taxes on such dividends as accruing and credited to her in the preceding year (1934), and the husband does not include the same in his Individual Income Tax Return for that year (1934)—would the fact that, after all such returns, and after more than sixteen months subsequent to the alleged stock gift, the monies above stated as accruing during the preceding year (1934) are transferred from the wife's account to the husband's account on the Company's books, and he then uses such monies, render him (or his estate after his death) liable for Federal income taxes on such dividends and profits from a sale, accruing and credited to the wife during the preceding tax year (1934), so as to render the husband liable for *taxes on such previous year's dividends and profits,* instead of the wife *for that year,* in the absence of any fraud or shams designed to evade tax? The Circuit Court of Appeals and the Tax Court erred, by application of erroneous rules of law, in holding the husband (and his estate) liable for such 1934 taxes.

6. Where, under the laws of Georgia (embodied in its statutes and appellate court decisions), effective at the time of the transactions in this State, a partnership may be created by oral contract, or may arise from a joint ownership, use, and enjoyment of the profits of undivided property, real or personal, and where, unless otherwise provided by agreement, partners are made by such local law equally interested in all the stock or property brought into the business, it matters not by which partner, and are made equally entitled to share the profits and equally bound to pay the losses, and a married woman may lawfully be a member of a partnership with her husband, and is entitled to an accounting for her share of the profits,

although she has not managed or actively participated in the business; and where a husband and wife, for the carrying on of a hat manufacturing business (not of the personal-service or technical-expert class), orally agree that she shall be a partner therein, on account of her having contributed and the husband having used, in building and equipping such plant, monies derived from corporate stock, under his alleged gift to her more than two years before, and where there are no other persons as partners at the time of formation of such alleged partnership (in 1936), and where (after several months' operation in the business by the husband's brother during the husband's illness, in late 1935 and early 1936, and receipt by the husband of a deed back to the plant and business), the business is then operated under a trade name, and the husband informs other persons that such a partnership exists, and at the close of business (December 31, 1936) book entries are made showing such a partnership and the interests of the partners, and there are no fraud or shams designed to evade tax in the transactions, and the business thus continues during the next year (1937)—do such oral partnership agreement and operation of the business constitute a valid partnership, for Federal income tax purposes, as to either of such years, even though the husband, by the wife's agreement or consent, actually manages the business in both years, and she takes no active part therein otherwise than with respect to the capital as stated? The Court of Appeals and the Tax Court erred in holding adversely to Petitioner as to such matters, by erroneously holding that the husband had made no valid gift to his wife (under errors of law as above indicated), and that she had made no contribution to the capital (under such errors and the error indicated in this question), and in holding erroneously, as a matter of law, that the wife's lack of active participation in the business was fatal to a partnership.

7. Where the law of the State of the transactions, at the time thereof, exists as stated in the preceding question, and the parties act as therein stated—can the existence of such a partnership be nullified or ignored, for Federal income tax purposes, for the reasons assigned by the Tax Court of the United States, and the Circuit Court of Appeals for the Fifth Circuit by affirming such decisions: that the two-year-previous alleged gift of corporate stock by the husband to the wife was invalid for lack of donative intent, by reason of the husband's retention and exercise of dominion and control over such stock; that (as Petitioner, executrix of her husband's estate) she relied on a "*purchase*" of her interest in the alleged partnership, and not on a "*gift*" from her husband of such partnership interest; and hence, since the original stock gift was invalid, she had not "*purchased*" such an interest, that she had nothing to give to her children (who were given small interests in the alleged partnership, first orally and last in June or July 1937 by a written trust agreement and a limited partnership agreement signed by the husband and wife as individuals and as trustees); and that,—notwithstanding the oral 1936 agreement, and the 1937 written agreements making the husband alone the general partner, who alone under the Georgia law of limited partnerships could manage the business and act for the partnership—there was no sort of partnership during either 1936 or 1937? The Circuit Court of Appeals and the Tax Court erred in so holding, and their rulings were based upon such manifest errors of law, in contravention of the undisputed facts; the record merely showing a recital in such 1937 trust agreement that Josephine M. Sewell had "purchased and paid for" an interest in such hat manufacturing business (which, if not accomplished by the validity of the previous gift, at least operated as a gift, of such interest, provided there was no implied trust under

the rule of the Georgia Supreme Court, that a use by a husband of his wife's monies creates such a trust); and the record wholly failing to show that Petitioner, in contending that a partnership existed in both 1936 and 1937, limited her reliance to a "purchase" or to any specific basis in acquiring her interest.

8. Where the laws of Georgia, the State of the transaction involved, then and since have recognized the validity of general partnerships created by oral agreement, and have made such partners *equally* entitled to share in the profits and losses of the business, although the wife does not actively participate therein, and have recognized the validity of limited partnership agreements, created in writing and giving only the general partner a right to manage the business, and have recognized the validity of trusts for minor children, and where in June or July of the last year indicated in the preceding question (1937) the husband and wife executed such a limited partnership agreement and such a trust agreement (by which their four minor children received first a 20 percent interest and later a 33⅓ per cent interest in the partnership and assets of the business), and only the husband was made the general partner (with the right of management as provided by statute), and where the statutory formalities as to limited partnerships were complied with, and no attack has been made upon the validity of such trust and limited partnership instruments (other than to insist that the former was not executed until the middle of 1937, which Petitioner concedes), and where the parties conducted the hat manufacturing business during 1936 and 1937 as stated in this and the two immediately preceding questions, and the husband for both of such years made to the Government tax authorities Partnership Income Tax Returns, showing a partnership with interests as above stated, and the hus-

band and the wife in their separate Individual Income Tax Returns for those years returned the profits from such business according to the partnership status and interests in them as above stated, and paid their income taxes accordingly, besides making Gift Tax Returns as to their children with respect to the interests given them; and where the parties in each of such years have acted upon the assumption that such partnership and partnership interests existed, and in 1938 executed to the Reconstruction Finance Corporation a security deed to the assets of the business, signing as a partnership, and where there were no fraud or shams to evade tax in such transactions—could the Circuit Court of Appeals and Tax Court of the United States legally or properly fail to apply the local law as to the validity of such a general partnership in 1936, or, limited partnership in 1937 (the tax years involved), or properly fail to apply the definition by this Court of a partnership, made in *Meehan* v. *Valentine,* 145 U. S. 618, in consonance with the local law, or properly base their holdings on erroneous rules of law and incorrect legal standards, above stated, as to what constitutes a valid partnership for Federal income tax purposes? The Tax Court erred in so holding as to each of the years 1936 and 1937, as well as in holding that the alleged stock gifts in 1934 and 1936 were invalid; and the Court of Appeals erred in affirming such holdings and decisions, for the reasons stated.

9. Petitioner (to comply with the Rules of this Court) also assigns error on the refusal of the Circuit Court of Appeals and the Tax Court to grant redeterminations of the alleged income tax deficiencies in each of the years 1934, 1935, 1936, and 1937, for each of the reasons above stated; and urges that each adverse holding complained of is without substantial evidence to support it, if the correct legal rules and standards as to gifts and partner-

ships, as stated in this petition, are given effect, and that the adverse holdings of the Tax Court are without legal warrant in the record; and therefore that the Court of Appeals erred in affirming such holdings and decision.

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals for the Fifth Circuit is in conflict with the decisions of other Circuit Courts of Appeals on the same matter, in the law of *gifts,* and in such law for Federal income tax purposes; in that the Court below, in affirming the holdings of the Tax Court, held that the alleged gifts of corporate stock—though made by transfers on the corporate books, the cancellation of the donor's certificates, the issuance of new certificates therefor to the donee, and with Gift Tax Returns, and acknowledgments of the donee, made by the donor to the Government tax authorities, and other acts of the parties as stated—were invalid for lack of donative intent and for continued exercise by the donor of dominion and control over the stock, for the sole reasons that there was no physical delivery of the stock certificates to the donee, and that, more than sixteen months after the transfer and subsequently, the donee used dividends and other proceeds from the stock. Such decision directly conflicts with two decisions of the Circuit Court of Appeals for the Sixth Circuit, *Marshall* v. *Commissioner,* 57 F. (2d) 633, and *Bardach* v. *Commissioner,* 90 F. (2d) 323; each holding, in Federal income tax cases, that such a transfer on the books of a corporation from a husband to his wife, constitutes in itself a delivery, vests legal title to the transferred stock in the wife; and that subsequent use by the husband of dividends or proceeds from the stock are without effect to invalidate the gift, since what the wife does with her monies after the gift is "a matter of com-

plete indifference." The present decision also conflicts with those of the Circuit Court of Appeals for the Eighth Circuit in *Edson* v. *Lucas,* 40 F. (2d) 398, 406, and *Mahaffey* v. *Commissioner,* 140 F. (2d) 879, 882; the former involving a gift of stock in trust with the question of bona fides, and holding that "The gift, if completed at all, was completed in 1919, and what (the alleged donor) did with the proceeds of the stock in 1920 could not defeat it;" and the latter holding that "The subsequent transactions of petitioner with reference to the stock transferred in trust are without significance." The instant decision is further contrary to the decision of the Circuit Court of Appeals for the Second Circuit in *Guaranty Trust Co.* v. *Commissioner,* 98 F. (2d) 62, to the effect that, where a question of collateral agreement or condition as to the loan of identical amounts of money back to the donor was involved, this could be shown by proof that there was "no clear separation of the discussion culminating in the alleged gift and the discussion about setting up the trusts and lending the money back to the husband * * * made that evening," all the steps following "one another closely and the entire transaction (being) agreed upon," and the trust deed "executed the day following the conversation;" but that, if the gifts "were completed before the agreements that the money should be loaned," the transaction was valid. The present decision is also contrary to that of the last-named Circuit Court of Appeals in *Richardson* v. *Smith,* 102 F. (2d) 697, where, unlike the present case (where the Tax Court held that there were "no shams designed to evade tax"), the question arose as to whether there was "a sham" in an alleged gift by husband to wife, and it was held that "a series of transactions," in all of which the wife might have yielded to her husband's will, all *practically contemporaneous* with the gift in question, could be considered on the question of donative intent,

dominion and control, or agreement or understanding between the parties at the time of the alleged gift; but that a mere expectation or hope of the donor, at the time of the transaction, that he will receive benefits from the subject-matter of the gift is insufficient; and the case was remanded for reconsideration of the facts in the light of the correct rule of law.

2. The decision of the Circuit Court of Appeals for the Fifth Circuit, in nullifying the transactions here involved—although, as the Tax Court itself found, there were no fraud and no "shams designed to evade tax," and although the uncontroverted facts showed that the transactions were actualities and not fictions—also conflicts with decisions of the Circuit Court of Appeals for the Eighth Circuit in *Fordyce* v. *Helvering,* 78 F. (2d) 525, following earlier decisions by the instant appellate court itself in *Saenger* v. *Commissioner,* 69 F. (2d) 631, and *Planters Cotton Oil Co.* v. *Hopkins,* 53 F. (2d) 825, that "fraudulent pretense absent, the Government accepts the taxpayer as it represents itself to be, and it must make its returns and pay its taxes accordingly." The present decision on the same matter also conflicts with those of the Circuit Court of Appeals for the Second Circuit in *Johnson* v. *Commissioner,* 86 F. (2d) 710, that "legal transactions cannot be upset merely because the parties have entered into them for the purpose of minimizing or avoiding taxes which might otherwise accrue;" and *Chisholm* v. *Commissioner,* 79 F. (2d) 14 (101 A. L. R. 200, 204), that a tax-saving object "is, of itself, no reason for non-recognition of the transaction, if it was *real and not illusory.* Mere purpose to avoid tax does not in itself vitiate a transaction." (All italics ours.)

3. The decision of the Circuit Court of Appeals in this case—by affirming the decision and holding of the Tax

Court that no partnership existed, not only because as held the wife contributed nothing to the capital of the business, but because the husband managed the business and she took no active part therein, and, in effect, that such an active participation by her was necessary to a valid partnership for Federal income tax purposes—also is in conflict with the decisions of two other Circuit Courts of Appeals to the contrary, holding in effect that (in businesses not essentially of the personal-service or technical-skill type), a material contribution to capital alone is sufficient—by the Circuit Court of Appeals for the Tenth Circuit in *Champlin* v. *Commissioner,* 71 F. (2d) 23, 26; and the Circuit Court of Appeals for the Sixth Circuit in *Rose* v. *Commissioner,* 65 F. (2d) 616.

4. The Circuit Court of Appeals in this case has also decided Federal questions in a way probably in conflict with applicable decisions of this Court; such questions involving the validity of gift and partnership transactions under a proper recognition of the correct legal rules as to the taxability of income from such alleged gift property and from profits of such alleged partnership, under the Federal income tax statutes, Sections 11, 12(b), 22(a), 181 and 182 of the Revenue Act of 1934, c. 277, 48 Stat. 680, and identical provisions under those numbers in the Revenue Act of 1936, c. 690, 49 Stat. 1648, and later Revenue Acts (26 U. S. C. A. "Internal Revenue Acts," pp. 665, 669, 728); the first three sections relating to normal tax, surtax, and gross income, and the last sections to partnerships. The decision and holdings in this case that income and profits from the alleged gift properties and the alleged partnership were taxable solely to the donor husband and his estate, and in failing to apply the controlling local law of the State under its highest court decisions as to the validity of such gifts and partnership—notwithstanding the holding of the

Tax Court that there was no fraud, evasion, or sham in such transactions, and the undisputed evidence as to the reality of the transactions, the completeness of the gifts, and the actuality of the partnership—conflicts with decisions of this Court:

(a) In *Gregory* v. *Helvering*, 293 U. S. 465, and *Moline Properties* v. *Commissioner*, 319 U. S. 436, holding in effect that, where there is no fraud or fiction, a mere motive of tax reduction or avoidance will not nullify actual transactions.

(b) In *Meehan* v. *Valentine*, 145 U. S. 618, that "The requisites of a partnership are that the parties have joined together to carry on a trade or adventure for their common benefit, each contributing property *or* services, and having a community of interest in the profits;" thus, in effect holding, contrary to the present decision, but in conformity with Georgia law, that a contribution to capital is sufficient without the rendition of services.

(c) In *Morgan* v. *Commissioner*, 309 U. S. 78, 80, holding that "State law creates legal interest and rights. The Federal Revenue Acts designate what interests or rights so created shall be taxed." In *Blair* v. *Commissioner*, 300 U. S. 5, and *Helvering* v. *Stuart*, 317 U. S. 154, holding that the rules of State law control as to grantees, donees, and others taking under deeds, wills, or trusts. In *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245, and *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 445, recognizing, as in the preceding cases, the controlling effect of State statutes and appellate decisions on property rights, unless there is a conflicting Federal statute.

5. The Circuit Court of Appeals in this case has also decided important questions of local law in a way probably in conflict with applicable local decisions: (a) As to *gifts*—

in holding in effect that these were not complete or valid in the absence of a manual delivery of the corporate stock certificates to the donee, notwithstanding the uncontroverted facts as to the transfers on the books of the corporation, with formal acceptance by the donee's signed acknowledgments to the Government attached to the donor's Gift Tax Returns, and as to the donee's sole exercise of dominion and control over the stock by sales and written pledges thereof in her own name; such holdings being contrary to the Georgia appellate court decisions construing or under its Code of 1933, Sections 48-101—48-103 and 53-404, in terms dispensing with the necessity of "actual manual delivery" where there has been a "constructive delivery," consisting of any act indicating a renunciation of dominion by the donor and its transfer to the donee, creating a presumption of acceptance by the donee, and permitting transfers of property by husband to wife; such decisions holding that a symbolic delivery will suffice, and "the mere fact that the donee allows possession to remain with the donor will not necessarily defeat a gift" (*Hall* v. *Simmons,* 125 Ga. 801); that, where the conduct of the parties shows a change in the ownership of chattels, a gift is complete without the necessity of an actual delivery (*Poullain* v. *Poullain,* 79 Ga. 11; *Underwood* v. *Underwood,* 43 Ga. App. 645); that "the legal unity of husband and wife has, in Georgia, for most purposes been dissolved, and a legal duality established. A wife is a wife, and not a husband as she was formerly * * * A husband can make a gift to his own wife, although she lives in the house with him and attends to her household duties, as easily as he can make a present to his neighbor's wife." (*McNaught* v. *Anderson,* 78 Ga. 503.)

(b) *As to partnership*—in failing to apply to the uncontroverted facts as to an actual partnership, in each of the

years 1936 and 1937, the controlling rules of local law, in decisions construing or under the Georgia Code of 1933, Section 75-101, that "a partnership may be created by • • • parol contract, or it may arise from a joint ownership, use, and enjoyment of the profits of undivided property, real or personal;" Section 75-206, that "unless otherwise provided in the agreement, partners shall be equally interested in all the stock or property brought into the business, it matters not by which; partners shall be equally entitled to share the profits and equally bound to pay the losses;" and Sections 75-401—75-409 and 75-417, providing for limited partnerships with general and special partners, and authority only for the general partner to manage or act for the partnership; and such decisions holding that an oral partnership agreement is sufficient, even though the nature of the property would otherwise be covered by the statute of frauds (*Lane* v. *Lodge*, 139 Ga. 93(3, b); *Smith* v. *Padrosa*, 139 Ga. 484, 487); that it has been long settled in Georgia, under its Supreme Court cases cited, that "a married woman may contract to become, and actually become, a member of a partnership with her husband, or other persons," and (in a case of general partnership) "it is not necessary to specify as to the liability for the losses in such cases," and the wife is entitled to an accounting for her share of the profits, "though she had *no participation in the active management of the business.*" (All italics ours.) (*Butler* v. *Frank*, 7 Ga. App. 655 (2), 657, 658.)

(c) *As to partnership*—in failing to apply the local rule, laid down by the Supreme Court of Georgia in *Allen* v. *Allen*, 198 Ga. 269(3), that, "Whenever a husband, with or without the wife's consent, acquires from her money which is her separate property, he must be deemed to hold it in trust for her benefit, in the absence of any evidence that she intended to make a gift to him;" so that, if there were

complete, valid gifts by the husband to the wife of the corporate stock here involved, and if the husband used its proceeds either "with or without the wife's consent," without anything to show a "gift" of such proceeds by the wife to the husband, such proceeds constituted an *implied trust* to the wife—irrespective of whether or not she had expressly *loaned* them to the husband, and she could have imposed such trust on the plant and assets of the Sewell Hat Manufacturing Company, unless her husband recognized and protected her rights. He having done so, by orally agreeing that because of such contribution she would be a partner in the business (according to the uncontroverted evidence), her contribution, as a matter of law, afforded full consideration for the partnership agreement, and a contribution (more than half) to the capital. Therefore the holding of the Tax Court that she "*purchased*" no interest in the partnership was erroneous, was contrary to the controlling law of the State in such a case; and the decision of the Court of Appeals in affirming such decision and holding was likewise contrary to such law.

6. The Circuit Court of Appeals in this case has decided important questions of Federal law which have not been, but should be, settled by this Court—not only because of the conflict of this decision with those of other Circuit Courts of Appeals and local decisions on important questions, and a probable conflict with decisions of this Court—but because the particular questions of law here raised have never been decided by this Court, and such a decision is of vast importance—to enunciate and settle the true principles of construction and rules to be applied in Federal income tax cases under the Internal Revenue Statutes as to gifts, partnerships (with the essentials thereof in such cases, as to a contribution of capital and active participation in the business); whether the rules of "economic"

ownership or enjoyment and of dominion and control "for income tax purposes" as between a husband and wife, announced by this Court, apply to ordinary gifts as well as to those in trust, and apply where there is no fraud or sham designed to evade tax, and to what extent local statutes and decisions, which would otherwise control, are applicable, in Federal Income Tax cases, to gifts and partnerships. A decision of such vital questions, on which the Circuit Courts of Appeals and the Tax Court itself (by conflicts in decisions and dissenting opinions) have long been much divided, with confusion in the proper construction and administration of Federal tax law and the application therein of local law, we respectfully submit is vitally important to tax authorities, taxpayers and all attorneys who are constantly called upon to advise them, without certainty as to the correct legal rules, standards, criteria, and tests to be applied in such cases.

While this Court has decided many questions as to trusts under the income tax statutes, and the effect thereon of State laws and decisions, it has made no such decision with regard to other gifts. Nor has this Court made a determination of the questions here involved as to partnerships; *Meehan* v. *Valentine,* 145 U. S. 618, only defining generally the requirements of a partnership, though indicating that either a contribution to capital alone or services will suffice; and *Burnet* v. *Leininger,* 285 U. S. 136 (the only decision relating to partnerships in income tax cases) being inapplicable to the present questions, since the husband there gave to his wife only "a derivative interest" without a transfer of "partnership corpus" (making the rule of *Lucas* v. *Earl,* 281 U. S. 111, controlling), and other partners did not consent to the wife's becoming a member of the partnership.

Statutes Involved

The Federal Statutes involved are Sections 11, 12 (b), 22 (a), 181, 182, and 801 (a) (3) of the Revenue Act of 1934, c. 277, 48 Stat. 680, and identical provisions with corresponding numbers in the Revenue Act of 1936, c. 690, 49 Stat. 1648, except that the last-stated section is numbered 1001 (a) (3), these provisions appearing also in subsequent Revenue Acts (26 U. S. C. A., "Internal Revenue" and "Internal Revenue Acts 1924 to Date"). The local statutes involved are Sections 48-101, 48-103, 53-404, 75-101, 75-206, 75-401, 75-406, 75-409, 75-417, and 108-114 of the Georgia Code of 1933. These Federal and State statutes are set forth in the *Appendix* after the Brief in support of this Petition.

Wherefore your Petitioner, referring to the attached Brief in support of the foregoing reasons for review, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case; and that the said judgment and decision of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court; and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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